No. 82-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, et al.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR RESPONDENTS

Burton [illegible]

Pamela [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

QUESTION PRESENTED

Did the Court below err in holding that the Interstate Commerce Commission lacks authority to retroactively invalidate tariff rates that have become effective in accordance with the Interstate Commerce Act's provisions for establishing rates, but which are subsequently found to have been adopted or published under procedures that violated an approved motor carrier rate bureau agreement?

PARTIES TO THE PROCEEDING

The following were original petitioners below and are respondents here: American Trucking Associations, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association, Inc.; New England Tariff Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference. The following were intervenors in support of the original petitioners below: Alaska Carriers Association, Inc.; Bulk Carrier Conference, Inc.; Drug & Toilet Preparation Traffic Conference, Inc.; Heavy & Specialized Carriers Tariff Bureau; Household Goods Carriers' Bureau, Inc.; Motor Carriers Traffic Association, Inc.; National Association of Specialized Carriers, Inc.; National Small Shipments Traffic Conference, Inc.; Ohio Motor Freight Tariff Committee, Inc.; and Steel Carriers' Tariff Association, Inc. The affiliates of respondent American Trucking Associations, Inc. are named in an attachment to the Brief for Respondents filed in this case on May 31, 1983.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (J.A. 4-16; Pet. App. 32a-72a, 73a-84a, and 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983, and was granted on June 20, 1983 (J.A. 17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10706, 10762, 11701, and 11705 are set forth at Pet. App. 96a-100a.

STATEMENT OF THE CASE

In the proceeding under review below, Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, the Interstate Commerce Commission promulgated a number of rules which purport to interpret and implement certain provisions of Section 14 of the Motor Carrier Act of 1980 governing the operations of rate bureaus. Respondents include the major motor carrier rate bureaus. These rate bureaus perform their functions under procedures set forth in collective ratemaking agreements which are filed with the ICC and which, if they comply with the requirements and restrictions in Section 10706(b) of the Interstate Commerce Act, are required to be approved by the ICC. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

A. The Motor Carrier Act Of 1980 And Its Background

The Motor Carrier Act of 1980 was adopted largely in response to efforts by the ICC to "deregulate" the motor carrier industry by administrative fiat. When Congress began to deal in earnest with motor carrier regulation in 1979, Congressional leaders roundly condemned the ICC's efforts to rewrite the existing regulatory scheme. For example, on October 22, 1979, the Chairman of the Senate Committee on Commerce, Science, and Transpor-

tation, which considered the Motor Carrier Act of 1980, expressed the concern of Congress when he said:

> I do not believe that the ICC should embark upon a course of action to redefine completely and unilaterally our national transportation policies. . . . To borrow a phrase, we are mad as hell, and we're not going to take it anymore. It is time that the agencies began to listen to the Congress, and it is time for the Congress to be much more explicit in the direction that it believes Federal Agencies should be moving.[1]

These sentiments were echoed by other Congressional leaders. For example, during the floor debates on the Motor Carrier Act of 1980, Congressman Harsha, then the ranking minority member of the House Committee on Public Works and Transportation stated:

> In the recent past, the ICC embarked upon a program to review and reevaluate its long-standing interpretations and implementation of the Interstate Commerce Act. In effect, the ICC embarked upon a course of action to redefine completely and unilaterally our national transportation policies. This has contributed to the growing sense that the Government has become so large and unwieldy; that it is virtually out of control. Moreover, there is a widespread belief that the ICC is oblivious to the wishes of Congress. 126 Cong. Rec., H. 5346 (June 19, 1980).

The 1980 Act was intended to restrain the ICC from charting its regulatory course outside the boundaries of its governing statute. After giving paramount importance to the need to "reduce unnecessary regulation," the

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[1] Address by Senator Howard Cannon, Chairman, Committee on Commerce, Science, and Transportation, United States Senate, to ICC Workshop on Motor Carrier Regulation, October 22, 1979.

1980 Act sets forth the following statement of Congressional purpose and intent:

> . . . in order to reduce the uncertainty felt by the Nation's transportation industry, the [ICC] should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the [ICC] should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress. Motor Carrier Act of 1980 §§ 2 and 3, 94 Stat. 793, *reprinted at* 49 U.S.C. § 10101 note.

In Section 14 of the Motor Carrier Act of 1980, Congress focused its attention specifically on motor carrier rate bureaus. In the years immediately preceding the adoption of that Act, the ICC had attempted to use its rulemaking authority, in furtherance of its deregulation efforts, to drastically curtail collective ratemaking. For example, in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements*, (43 Fed. Reg. 1809, January 12, 1978), the ICC proposed to do what Congress had specifically declined to do, namely, apply to motor carrier rate bureaus the severe restrictions on collective ratemaking statutorily imposed on rail rate bureaus by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 49 U.S.C. § 10706(a). And, in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 10706(b) Application Proceedings*, (43 Fed. Reg. 1666, January 11, 1978), the ICC undertook to review individual ratemaking agreements to determine if continued approval would be warranted under a new standard adopted by it. The ICC's standard required the parties to an agreement to show not only that the agreement enhanced the goals of the National Transportation Policy (49 U.S.C. § 10101), the only showing then required by stat-

ute, but also that it did not have anticompetitive effects or that, if it did, those effects were outweighed by the benefits to the National Transportation Policy.

In considering the Motor Carrier Act of 1980, Congress was aware that the "Commission has recently embarked upon a series of reviews of rate bureau agreements to determine whether they should be continued and, if so, under what conditions" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27 (1980)). Congress determined to put a stop to these activities by giving the ICC "explicit direction" with respect to the regulation of rate bureaus. As the Court of Appeals noted in its decision:

> Under the prior provisions there were virtually no statutory conditions to the approval of a rate bureau agreement. Instead the ICC was given broad discretion to approve agreements "when it finds that the . . . agreement will further the [national] transportation policy," . . . and was given broad power to require compliance with conditions it considered necessary to further that policy. Under the new provisions, Congress has established a detailed set of conditions for approval and has instructed that a rate bureau agreement "*shall be approved* by the Commission upon a finding that the agreement fulfills each requirement of [the statute], *unless* the Commission finds that such agreement is inconsistent with the [national] transportation policy" (Pet. App. 6a) (emphasis in original).

The legislative history of the 1980 Act confirms that Congress intended to reduce the ICC's discretion with respect to the regulation of rate bureaus. The House Report states that:

> . . . the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-

> hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow and reducing the discretion of the Commission to expand those limits (H.R. Rep. No. 96-1069, *supra*, at 29).

Section 14 of the Motor Carrier Act of 1980 covers such minute details as the time limits for bureau decision-making on rate proposals, a requirement that proxies be in writing, a restriction against bureau employees acting on proposals, and a requirement that upon request, the bureau must divulge to any person the name of the proponent of a proposal. With respect to remedies for violations of rate bureau agreements, however, the 1980 Act made no changes other than to place new limits on the existing remedies. The existing remedies in 49 U.S.C. § 10706 (f) and (g), which authorize the ICC to change the conditions of approval or terminate an agreement, were made subject to the new burden of proof provisions in 49 U.S.C. § 10706(b). In other words, the ICC can no longer take such action *unless* it finds that the agreement is *inconsistent* with the transportation policy. Moreover, the 1980 Act added the following provision as new § 10706(b)(3)(E):

> In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.[2]

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[2] This provision was designed to protect from harassing antitrust litigation carrier members of a bureau which engage in consciously parallel pricing with respect to rates which the Motor Carrier Act of 1980 withdrew from their collective consideration, *e.g.*, zone or rate freedom or new released rates (see 49 U.S.C. § 10706(b)(3)(C)). As to

B. The ICC's Response To The Motor Carrier Act Of 1980

Following enactment of the Motor Carrier Act of 1980, the ICC discontinued its Ex Parte No. 297 (Sub-No. 3) and (Sub-No. 4) proceedings, indicating that the new standards and restrictions proposed for adoption in those proceedings had been displaced by Congressional mandate. It subsequently instituted Ex Parte No. 297 (Sub-No. 5), however, purportedly to "interpret and implement" the "new requirements and standards" imposed on motor carrier rate bureaus by Section 14 of the Motor Carrier Act of 1980. Notice of Proposed Policy and Notice of Interim Requirements (J.A. 4). The ICC's Notice made immediately effective without observance of the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, a series of so-called "interim" rules governing the operations of rate bureaus.

In its Notice, the ICC observed that the new burden of proof and parallel pricing provisions in § 10706(b)(3)(E) made it "extremely difficult" for a party to show that a violation of a rate bureau agreement occurred (J.A. 8). Moreover, it found "troublesome" the "lack of definite remedies for proven violations" other than "the obvious potential remedy of withdrawal of immunity" (J.A. 9). It proposed, therefore, to adopt a new "standard that provides that proof of significant violations of an agreement . . . will automatically result in tariff rejection" (J.A. 9). The ICC proposed to suspend and investigate tariff items

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an identical provision made applicable to rail rate bureaus by section 109 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10706(a)(3)(C)(i), the drafters of the Senate Report stated that the provision "is consonant with the intent of Congress . . . to remove the threat of antitrust litigation in the courts with regards to rate bureau practices which are consistent with the public interest" (S. Rep. No. 94-499, 94th Cong., 2d Sess. 56 (1976)).

where "the allegations of improper activity are not sufficient to warrant rejection" (J.A. 9).

The respondent carrier organizations, joined by two national organizations representing shippers, petitioned the Court of Appeals for review of the interim rules and moved for a stay of the rules *pendente lite*. The Court granted the motion for stay. While the petition for review was pending the ICC issued its final rules, and the Court granted a motion to amend the petition to embrace the final rules.

Notwithstanding the objections of two of its members, the ICC adopted a final rule authorizing the rejection, pursuant to 49 U.S.C. § 10762(e),[1] of bureau tariffs "which have been adopted or published under procedures which violate approved agreements" (Pet. App. 68a). The rule provided that a "shipper may file a verified complaint seeking to have tariff material stricken before or within 60 days after the effective date of the tariff" (Pet. App. 68a). An employee board, the so-called Tariff Integrity Board (TIB), would initially entertain all allegations of violations of rate bureau agreements. The results of the TIB's investigations and its recommendations would be submitted to the ICC for action. The ICC also announced its intention to suspend and investigate tariffs on the basis of alleged agreement violations, reasoning that: "As we have the power to strike or reject a tariff for these violations, we clearly have the power to take this less drastic action" (Pet. App. 68a).

[1] Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations issued thereunder.

C. The Court Of Appeals Proceedings

The Court of Appeals struck down the ICC's rule authorizing rejection or suspension of tariffs for violations of rate bureau agreements. Construing 49 U.S.C. § 10762(e), the Court noted that "the plain meaning of rejection is to refuse to receive" and that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date, . . . [and] an investigation is the only mechanism available for challenging *effective* tariffs' " (Pet. App. 28a, emphasis in original). The Court further noted that "there are compelling reasons to restrict rejection to the period before a rate becomes effective" (Pet. App. 28a). It stated:

> Because a carrier may charge only the rates on file, and because rejection has the effect of declaring a rate void *ab initio* as if never filed, rejection necessarily carries with it a right to refund for overcharges (in the case of rate increases), measured always by the preexisting rate. This undermines the uniformity and reliability interests that the system of tariff filing was meant to foster (Pet. App. 28a, footnote omitted).

"Review of the statute, the major decisions, and policy," the Court said, "leads us to conclude that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking" (Pet. App. 29a).

Petitioners challenge the Court's findings only insofar as they bar *rejection* of effective tariffs. Petitioners concede that "the tariff suspension provisions of the Act (49 U.S.C. § 10708) . . . are expressly limited to 'proposed' tariffs" (Br. 17).

SUMMARY OF ARGUMENT

I.

In adopting its tariff rejection rule, the ICC ignored the will of Congress. In the Motor Carrier Act of 1980, Congress gave the ICC "explicit direction" with respect to the regulation of rate bureaus, and warned it not to go beyond the statutory limits. Congress deliberately chose not to expand the existing remedies for violations of rate agreements, which limit the ICC to changing the conditions of approval or terminating the agreement. Indeed, Congress placed new limits on the existing remedies in the 1980 Act.

Under these circumstances, the existing remedies are necessarily exclusive. Nevertheless, under the guise of "interpreting and implementing" the new statutory provisions, the ICC created an entirely new remedy for violations of rate bureau agreements.

In adopting its tariff rejection rule, the ICC relied on 49 U.S.C. § 10762(e). Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations of the ICC carrying out that section. Clearly, however, the ICC cannot reject tariffs for violations of rate bureau agreements, for such violations are neither violations of Section 10762 nor of the ICC's rules "carrying out" that section.

Apart from the question of whether the ICC can reject tariffs for violations of rate bureau agreements, it can never reject effective tariffs. The statute and the caselaw limit the ICC's rejection power to use only against proposed tariffs.

Under the statutory scheme, the ICC has the power to investigate effective rates and if it determines that a rate

is unlawful, it can order the carrier to stop the violation. It can also prescribe a new rate to be followed in the future. Because the ICC's rejection and investigation powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with 49 U.S.C. § 10762, the ICC also has the power to suspend a proposed rate for a limited period of time pending an investigation into its lawfulness. The ICC may take whatever action on such a rate as it could in a proceeding begun after a rate became effective.

If the ICC's interpretation of its rejection power is correct, its investigation authority and its suspension power are superfluous. It would not need authority to suspend proposed rates or order existing rates cancelled prospectively if at any time it could order such rates cancelled retroactively.

In addition, the Interstate Commerce Act provides a 30-day public notice period during which objections may be filed against proposed rates and the ICC may determine whether to reject or suspend them. What the ICC has attempted to do here is to extend this statutory period to 60 days after the tariffs have become effective. The statute specifically authorizes the ICC to "reduce the notice period." However, it gives the ICC no authority to extend it.

The decision below is also supported by the relevant caselaw. Of the four decisions by the Courts of Appeals that have squarely considered the question, three hold that the rejection power may not be used to retroactively invalidate effective tariffs. The one decision which holds to the contrary is pending before this Court on petitions for certiorari. That decision is plainly wrong. It ignores the context in which the rejection provision is found and

reads it as broad authority to reject tariffs at any time. It also ignores the "plain meaning of rejection" and the fact that had Congress intended the provision to be so read, it would not have found it necessary to empower the ICC to suspend proposed tariffs or investigate and cancel effective tariffs.

The other cases upon which the Government relies do not support its position. While it has been held that rates which were not filed in accordance with the Act's provisions for establishing rates, i.e. the mandatory 30-day notice provisions, had not been "legally established," it has been held that rates which were filed in accordance with those provisions but not in accordance with the ICC's additional requirements had been "legally established." Moreover, only one case holds that an illegality in filing renders a tariff nonexistent and subjects the carriers to liability for overcharges based on the prior rates. That case is in conflict with the decisions of this Court. Other courts of appeals and the ICC itself have refused to follow it.

II.

This Court has previously held that an effective tariff may not be treated as nonexistent because of some illegality, thereby rendering the carriers strictly liable for refunds measured by the preexisting rate without regard to whether the shippers suffered actual harm. Yet this is precisely the result that would be reached under the ICC's interpretation of its tariff rejection authority. The unfairness of this result can best be demonstrated by reference to the ICC's new tariff missymbolization rule that is the subject of related petitions for certiorari pending before the Court.

The tariff missymbolization rule would impose extraordinary liability on carriers for what amount to noth-

ing more than clerical or typographical errors. The rule provides that "[c]hanges resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectible."

The petitioner representing motor carriers explained that numerous tariffs make reference to the National Motor Freight Classification, which it publishes, and it is impossible to know what effect a change in the Classification will have on the rates and charges set forth in other tariffs. Hence, technical violations of the new rule will be unavoidable. Moreover, a single change in the Classification may apply to shipments handled by more than 3,000 carriers and rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day. While the ICC acknowledged that in certain instances tariff publishers "may not be able to gauge the exact effect of all tariff changes," it denied any relief from its rule.

The reviewing Court believed that the ICC would retain "sufficient discretion under the new regulation to take account of special cases in determining liability." However, the ICC will have no say in the matter because it has no jurisdiction over overcharge claims against motor carriers. A shipper's *only* remedy under the Interstate Commerce Act is to institute a "civil action."

Moreover, since the ICC has flatly declared that missymbolized increases are "invalid and not collectible" a court will not be in a position to exercise "discretion" either. Hence, a rule of absolute liability will be established in these cases, and the ICC will have reduced the requirement that a shipper bring a "civil action" to a mere formality.

ARGUMENT

I. The ICC Exceeded The Limits Of Its Rulemaking Authority.

As this Court has stated, an agency's rulemaking power is sharply limited by two constraints. First, the power to adopt rules is no more than the power "to carry into effect the will of Congress." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976). Second, the power is "bounded by the limits of the regulatory system of the Act which it supplements." *American Trucking Associations* v. *United States*, 344 U.S. 298, 313 (1953).

A. In Adopting The Tariff Rejection Rule, The ICC Ignored The Will Of Congress As Expressed In The Motor Carrier Act Of 1980.

(i) Congress gave the ICC explicit direction with respect to the regulation of rate bureaus and warned it not to go beyond the statutory limits.

The central issue in this case—whether the ICC exceeded the scope of its rulemaking authority—must be addressed in the context of the fact that the Motor Carrier Act of 1980 virtually eliminated the ICC's regulatory discretion with respect to rate bureaus. The express purpose of that Act was "to reduce unnecessary regulation by the federal government" and "to reduce the uncertainty felt by the Nation's transportation industry" as a result of the ICC's efforts to chart its own regulatory course (Sections 2 and 3, 94 Stat. 793). To accomplish these goals, Congress found that the ICC "should be given *explicit direction* for regulation of the motor carrier industry and *well-defined parameters within which it may act pursuant to congressional policy*" (Section 3, 94 Stat. 793) (emphasis supplied). The ICC, Congress warned, "should not attempt to go beyond the powers vested in it by the

Interstate Commerce Act and other legislation enacted by Congress" (Section 3, 94 Stat. 793). As the drafters of the Act put it, the explicit terms of the Act represent Congress's reaffirmation of "its role to control and set policy and guidelines for the conduct of interstate commerce" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 1 (1980)).

Section 14 of the Motor Carrier Act is a "clear example" of Congress's plan to give "explicit direction" to the ICC (H.R. Rep. No. 96-1069, *supra*, at 29). The ICC had, in recent years, ambitiously worked to refashion the collective ratemaking process according to its own regulatory agenda. In order to eliminate the resulting uncertainty over the future of rate bureaus, Congress "define[d] the limits which it believes the Commission should follow [in the regulation of rate bureaus] and reduce[d] the discretion of the Commission to expand those limits" (H.R. Rep. No. 96-1069, *supra*, at 29). Thus, the Section 14 amendments spell out in explicit detail those requirements and restrictions which Congress found should govern the collective ratemaking process.

(ii) Congress deliberately chose not to expand the existing remedies for violations of rate bureau agreements.

Significantly, Congress made no change in the statutory provisions dealing with remedies for violations of rate bureau agreements, other than to *limit* the existing remedies in the new burden of proof and parallel behavior provisions. 49 U.S.C. § 10706(b)(2), (3)(E), (f) and (g). The existing remedies authorize the ICC "to begin a proceeding" to "review an [approved] agreement" and to "change the conditions of approval or terminate it when necessary to comply with" 49 U.S.C. § 10706(b). The Act confers no right to damages for violations of rate bureau

agreements. Had Congress, which had exhaustively studied the rate bureau process and prescribed detailed procedures to govern it, desired or intended to impose additional remedies for violations of rate bureau agreements, it obviously would have done so in the Motor Carrier Act of 1980.

(iii) The existing remedies are necessarily exclusive.

Since Congress provided specific remedies for violations of rate bureau agreements and warned the ICC that it should not go beyond the explicit terms of the Act, the existing remedies are necessarily exclusive. As Commissioner Gilliam observed, "the *status quo* remains unchanged in this area and . . . the exclusive remedy is disapproval of the agreements" (Pet. App. 71a).

In its decision (Pet. App. 25a), the Court below makes reference to the second sentence of 49 U.S.C. § 10321(a), which provides in its entirety as follows:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

The Fifth Circuit recently discussed this provision in its decision holding that the ICC exceeded its statutory authority in requiring carriers to reimburse owner-operators for a portion of their fuel costs. *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (1983). The Court pointed out that the provision "is the product of the Revised Interstate Commerce Act of 1978." 698 F.2d at 1274. The purpose of that Act was to "restate in comprehensive form, *without substantive change*, the Interstate Commerce Act and related laws . . ." (H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4-5 (emphasis added). Thus,

the revisions were only clarifying and could not affect the substantive outcome of any issue. Revised Interstate Commerce Act, § 3(a), 92 Stat. 1466 (1978).

In the *Central Forwarding* case, the Court traced the origin of the second sentence of section 10321(a) to former section 15 of the Interstate Commerce Act, former 49 U.S.C. § 15. Paragraphs (1) through (15) of section 15 enumerated a number of specific powers of the ICC with respect to the determination of rates, allowances, divisions, routes and practices of railroad and pipeline companies. As the Court pointed out, § 15(16) provided:

> The foregoing enumeration of powers [relating to railroad and pipeline rate regulation] shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter [regulating railroad and pipeline carriers]. 698 F.2d at 1275, note 11.

There was no comparable provision applicable to motor carriers. The Court concluded that "[r]emoved from its statutory and historical content, this provision is practically devoid of meaning, and offers little help in determining whether the Commission is authorized to regulate compensation paid in motor transportation leasing agreements." 698 F.2d at 1274.[4]

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[4] Even if 49 U.S.C. § 10321(a) were applicable to motor carriers, it could not govern the outcome of this case, however, since the Revised Interstate Commerce Act provides that "[l]aws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency." § 3(a), 92 Stat. 1466, *reprinted at* 49 U.S.C. preceding 10101 note. The Motor Carrier Act of 1980 is such a law. By giving the ICC "explicit direction" with respect to the regulation of rate bureaus and providing that the ICC should not "go beyond the powers vested in it," Congress evidenced a clear intent to supersede any laws that could be construed as giving the ICC wide discretion in this area.

In the *Central Forwarding* case, the Fifth Circuit also discussed this Court's decision in *American Trucking Associations* v. *United States*, *supra*, ("ATA"), which the petitioners rely on here. There, this Court held that the ICC could regulate certain leasing practices despite the lack of any express delegation of power under the Interstate Commerce Act. The Fifth Circuit stated:

> Our reading of ATA and related cases is that a general rulemaking provision should be read as a kind of necessary and proper clause. It grants considerable powers to enforce the substantive mandates of federal law governing interstate motor transportation, but is tied to and limited by those specific substantive provisions. It does not open whole new horizons on the regulatory landscape. Congress has not delegated wholesale control of all affairs of motor carriers to the Commission, and it would require more than the language of 49 U.S.C. § 10321(a) to warrant a construction of the Act to that effect. 698 F.2d at 1277-78.

The Court also noted that the Motor Carrier Act of 1980 "changed (or at least made clear) the scope of ICC authority." 698 F.2d at 1277, note 15. Thus, it observed that the "[s]tatutory pronouncements subsequent to *ATA* strongly enforce a state of the law in accord with our reading of *ATA*. The Court concluded:

> ATA is undeniably still good law. . . . It must, of course, be read in light of subsequent statutory developments.
>
> We conclude that the general rulemaking provision imparts power to the ICC only to enforce and carry out the specific substantive mandates enacted by Congress. 698 F.2d at 1278.

It follows from what has been said above that in adopting the tariff rejection rule the ICC ignored the will of Congress. Clearly, the adoption of the rule marks a plain

effort by the ICC to continue its practice of lawmaking by way of rulemaking which the 1980 Act was designed to stop. At least one Commissioner was candid enough to admit this. Commissioner Gilliam warned his fellow Commissioners with respect to the tariff rejection rule:

> Congress has spoken on the question of rate bureaus. We should implement their intent and not attempt to increase our regulation whether it be through actual formal proceedings or through our enforcement efforts.

B. The ICC Cannot Reject Tariffs For Violations Of Rate Bureau Agreements.

(i) The ICC's § 10762 rejection power can only be used for violations of that section or the regulations issued thereunder.

The Interstate Commerce Act limits the ICC's rejection authority by expressly defining it. 49 U.S.C. § 10762(e) provides:

> The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulations of the Commission carrying out this section.

As the Court stated in *North Carolina Natural Gas Corp.* v. *U.S.*, 200 F. Supp. 745, 750 (D. Del. 1961): "The power given to the ICC to reject rates is specific but limited." The ICC may reject a tariff if it violates § 10762, which sets forth detailed procedures for establishing and changing rates, or if it violates the regulations issued thereunder.[5] Since the ICC can only exercise authority granted it by statute, it follows that it has no authority to

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[5] As authorized by 49 U.S.C. § 10762(b), the ICC has promulgated rules prescribing the form and manner in which tariffs are to be published. See, 49 C.F.R. § 1310, the tariff circular rules.

reject tariffs for any other reason. Hence, it cannot reject tariffs for violations of rate bureau agreements, for such violations are neither violations of § 10762 nor of the ICC's rules "carrying out" that section.

In *Delta Air Lines* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976), the Court construed provisions of the Federal Aviation Act which were virtually identical to the provisions involved here. It held that the CAB could not reject tariffs for violations which were neither violations of § 403 of the Federal Aviation Act, 49 U.S.C. § 1373, nor of the CAB's rules issued thereunder.* The Court stated:

> Summarizing the most important aspects of Section 403 and its underlying regulations, we repeat that no other relevant statutory provision authorizes "rejection," and section 403 itself strictly limits the use of this authority to tariff filings that are inconsistent with (1) the form and information requirements of section 403 or (2) the Board's regulations (14 C.F.R. Part 221 (1976)) establishing the proper form and manner for filing, posting, and publishing tariffs. In other words, section 403 only authorizes rejection for technical deficiencies in the form, the manner of filing, and the information content of proposed tariffs. 543 F.2d at 254.

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*The court summarized § 403 of the Federal Aviation Act, as follows:

> It requires every air carrier to file with the CAB tariffs "showing all rates, fares, and charges for air transportation" and "showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." These tariffs must "be filed, posted, published *in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with [section 403] and such regulations. Any tariff so rejected shall be void. . . .*" *543 F.2d at 253* (Emphasis in original).

(ii) The ICC does not have "inherent authority" to reject tariffs for violations of rate bureau agreements.

Reaching beyond the statutory limits on its powers, the ICC asserted that it has "inherent authority" to reject tariffs for violations of rate bureau agreements (Pet. App. 67a). For this odd proposition, the ICC relied on *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 989 (1972). In that case, various municipal electrical distribution systems petitioned for review of a Federal Power Commission order denying the municipal systems' motion to strike certain tariffs filed by Boston Edison Company. In upholding the FPC's order, the Court discussed, in general terms, the FPC's power to reject tariffs. The Court did not state that the FPC's rejection authority was without bounds. Rather, rejection was held appropriate "where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." 450 F.2d at 1346.[7] *Municipal Light Boards*, thus confirms that the tariff rejection authority of a regulatory agency is narrowly circumscribed and available only in cases where the filing is a nullity. It neither holds nor supports the contention that rejection is authorized for any reasons other than those permitted by statute.

Neither does *Acme Fast Freight, Inc. Common Carrier Application*, 17 M.C.C. 549 (1939), sustained *sub*

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[7] Consistent with that standard, rejection was inappropriate in the case before the Court because one of the grounds raised for rejection was subject to factual dispute and the other ground was not sufficiently substantial as to render the tariff a nullity. 450 F.2d at 1347-1348.

nom. Acme Fast Freight v. *U.S.*, 30 F. Supp. 968 (1940), aff'd 309 U.S. 638 (1940), support the ICC's broad view of its rejection authority. That case holds only that the ICC may properly reject a filing which, because it was filed by an unregulated entity, is not really a tariff at all and thus is a substantive nullity. As the lower court held, "The Commission acted under the express authority of the statute in striking the tariffs from its files." 30 F. Supp. at 974.

In any event, the ICC cannot rely on its "inherent authority" to reject tariffs in this case. As shown, the tariff rejection rule finds no predicate in the Motor Carrier Act of 1980. Hence, the ICC did not merely "interpret and implement" the new statutory provisions as it purported to do. Rather, it created a new remedy for violations of rate bureau agreements which was intended to have the force of law. The rule was, therefore, clearly "legislative" rather than "nonlegislative."* As such, the ICC was not entitled to rely on its "implied power to issue nonlegislative rules" (Pet. App. 4a). It could only issue the rule "pursuant to a Congressional delegation of power to issue rules and regulations that have the force of law" (Pet. App. 3a).

C. The ICC Cannot Retroactively Invalidate Effective Tariffs For Any Reason.

Apart from the question of whether the ICC can reject tariffs for violations of rate bureau agreements, it can never reject effective tariffs. As the Court of Appeals stated, "the statute and the caselaw limit [the ICC's rejection and suspension] powers to use only against proposed tariffs" (Pet. App. 31(a)).

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* See the discussion of "legislative" and "nonlegislative" rules in the decision of the Court below (Pet. App. 3a-5a).

(i) **The statute bars retroactive invalidation of effective tariffs.**

The rate regulatory authority of the ICC over motor carriers, set forth in 49 U.S.C. §§ 10762, 10704 and 10708, may be summarized as follows.

Subsection (a) of 49 U.S.C. § 10762 requires every carrier to publish and file with the ICC tariffs showing all of the rates governing the transportation it performs. Subsection (b) authorizes the ICC to prescribe the "form and manner" in which tariffs are to be published and filed. Subsection (c) provides that when a carrier proposes to change a rate, it must publish and file a notice of the proposed change 30 days before the proposed effective date. As shown, the ICC's rejection power is found in subsection (e).

49 U.S.C. § 10704 authorizes the ICC to investigate an effective rate concerning the issue of lawfulness. If, "after a full hearing" the ICC determines that a rate is unlawful, it may "order the carrier to stop the violation." It may also "prescribe the rate . . . to be [thereafter] followed."[9]

Because the ICC's §§ 10762(e) and 10704 powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with § 10762, 49 U.S.C. § 10708 gives the ICC the power to suspend a proposed rate for a limited period of time pending an investigation into its lawfulness. If the ICC does not take final action during the suspension period, the proposed rate is effective at the end of that

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[9] Prior to its recodification, former section 216(e) of the Act, 49 U.S.C. § 316(e), provided that the grant of authority over effective rates was limited to the prescription of rates "thereafter to be observed."

period. 49 U.S.C. § 10708(b). The ICC may take whatever final action on a rate (whether completed before or after the rate goes into effect), as it could in a proceeding begun after a rate became effective. 49 U.S.C. § 10708(a)(2).

If the ICC's interpretation of its § 10762(e) rejection power is correct, its § 10704 investigation authority and its § 10708 suspension power are a nullity. The ICC would not need authority to suspend proposed rates or order existing rates cancelled prospectively if at any time it could order such rates cancelled retroactively.

It is a fundamental principle of statutory construction that "effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant." *In Re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980), quoting 2A Sutherland, Statutory Construction § 46.06 (4th Ed. 1973). If the ICC's view of the Interstate Commerce Act is correct, then §§ 10704 and 10708 are surely superfluous and insignificant since the ICC would already have the power under § 10762(e) to investigate rates and order them cancelled, not only prospectively, but also retroactively. As the Court of Appeals held, however, the plain meaning of the statutory language contained in § 10762 clearly contradicts the interpretation advanced by the ICC.

In sum, as the statute makes clear, and as this Court held in *T.I.M.E., Inc.* v. *U.S.*, 359 U.S. 464 (1959), the regulatory authority of the ICC over the rates of motor carriers is prospective only, and its orders in the exercise of that regulatory authority can have no retroactive effect. Accordingly, the ICC cannot reject or suspend a tariff, cancel a rate, or declare it "void *ab initio*" retroactively. It can only reject or suspend proposed tariffs and order effective rates cancelled prospectively.

In addition, the statutory scheme of the Interstate Commerce Act makes it plain that the 30 day notice requirement was established to give interested parties an opportunity to object to new or changed tariff provisions before they become effective and to give the ICC an opportunity to examine such provisions and determine whether to reject or suspend them before they become effective. What the ICC has attempted to do here is to extend the notice period to 60 days after the tariffs have become effective. While 49 U.S.C. § 10762(d) empowers the ICC "to reduce the notice period . . . if cause exists," it has no authority to extend that period.

(ii) The decision below is fully supported by the relevant caselaw.

The rule at issue here has its background in two earlier ICC rules involving retroactive rejection of effective tariffs. Until 1979, the ICC examined all proposed tariffs for defects in form during the 30-day public notice period specified in the statute. If errors were discovered, the tariffs were rejected pursuant to 49 U.S.C. § 10762(e) prior to their becoming effective, and the carriers were required to resubmit them in acceptable form. For more than 30 years, the ICC consistently held the view that the "exclusive" remedy for a violation of the tariff filing requirements is rejection prior to the effective date of the tariff. *Shobe, Inc.* v. *Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975); *accord, Atlantic Commission Co., Inc.* v. *Bangor & A. R. Co.*, 226 I.C.C. 651, 688 (1946); *Heavy & Spec. Carriers Tariff Bur.* v. *U.S.A.C. Transport*, 302 I.C.C. 487 (1957).

In July 1979, in a proceeding styled Ex Parte No. 367, *Tariff Integrity Board*, the ICC announced that due to budgetary constraints and an increased number of tariff filings, it had abandoned its practice of comprehensive

tariff examination. Instead a random sampling program was established, which was later changed to a more limited program of title page examination. Because it expected an increased number of defective tariffs to become effective under the new procedures, the ICC proposed to establish a new rule which would permit it to retroactively invalidate effective tariffs for procedural defects on the basis of complaints filed up to 60 days after the tariff had become effective.

Certain of the respondents here challenged both the proposed rule and the decision to abandon the program of comprehensive tariff examination in the United States Court of Appeals for the Fifth Circuit.[10] When the new United States Court of Appeals for the Eleventh Circuit was established, the case was transferred there. In its decision in *Southern Motor Carriers Rate Conference* v. *United States*, 676 F.2d 1374 (11th Cir. 1982), the Court reversed, holding that the ICC did not have statutory authority to adopt the rule. Because it took that action, however, the Court found it unnecessary to reach the question of whether the ICC had improperly abandoned its tariff examining function.

In the meantime, again asserting as justification therefor the earlier decision to abandon its tariff examining function, the ICC adopted the following rule in Ex Parte No. 370, *Tariff Improvement*, 364 I.C.C. 217 (1980):

> Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provi-

[10] The carriers argued that the long-standing program of comprehensive tariff examination was abandoned without notice or opportunity for interested parties to be heard in violation of the Administrative Procedure Act, 5 U.S.C. § 553.

> sions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publication which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.[11]

Judicial review of this rule was again sought in the United States Court of Appeals for the Fifth Circuit. This time, however, the case was not transferred to the Eleventh Circuit. Thus, the Court was not bound by the earlier decision in the *Southern Motor Carriers* case, and it affirmed the ICC's decision. *Aberdeen & Rockfish R. Co.* v. *United States*, 682 F.2d 1092 (1982).

One of the respondents here, National Motor Freight Traffic Association, Inc., and the nation's railroads filed petitions for certiorari in the *Aberdeen* case, *National Motor Freight Traffic Association* v. *United States* and *Aberdeen & Rockfish Railroad Company, et al.* v. *United States*, Nos. 82-804 and 82-707. In their response to those petitions, the United States and the ICC noted the conflict between the decision below and the *Aberdeen* decision, and stated that they did not oppose the grant of the petitions. They suggested that it would be appropriate for the Court to defer consideration of those petitions until after their petition in this case was filed so that the cases could be considered together. While the Court has not yet acted on the carriers' petitions for certiorari, it is assumed that the *Aberdeen* case will be decided on the basis of the decision here.

In the *Southern Motor Carriers* case *supra*, the Court rejected the same arguments the Government makes here. It rejected the argument that 49 U.S.C. § 10762(e)

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[11] The ICC's tariff symbolization rules require tariff changes to be flagged by designated symbols to denote increases, reductions, or changes which result in neither increases nor reductions in charges.

authorizes the ICC to reject or strike effective tariffs. It stated that "[t]he plain meaning of reject is 'to refuse to receive' or 'decline to accept' " and "Section 10762(e) is worded accordingly." 676 F.2d at 1377. It further stated:

> That § 10762 does not specify rejection of effective tariffs and accords the carrier no procedural rights indicates that Congress intended the consequences of rejection to be minimal, namely refiling. By contrast Congress set out in detail elsewhere in the Act the Commission's power to rectify an effective tariff's substantive violations and the appropriate procedures. Section 10704 gives the Commission power to prescribe reasonable rates after an investigation and full hearing of either proposed or effective rates. When the Commission investigates the reasonableness of proposed rates it may either suspend or let a tariff become effective. §§ 10707 and 10708. 676 F.2d at 1378.

The Court also pointed out that the purpose of § 10762(d) "is to give to the public notice of proposed changes and opportunity to protest." 676 F.2d at 1377. It held that in empowering the Tariff Integrity Board to reject a tariff on the basis of a complaint filed up to 60 days after the tariff became effective, the ICC "in effect extended the public notice period by 60 days." 676 F.2d at 1379.

The Court in the *Southern Motor Carriers* case stated that even if it found § 10762 to be ambiguous, it "would resolve the ambiguity in favor of the Commission only if its construction 'enhance[d] the general policies underlying the legislation.' " The Court held that "[a]lthough the Commission's purpose of bolstering consumer protection in the face of budgetary restraints is consonant with the policies of the Act, the means undercut the Act's goal of market stability and strict application of filed rates . . . by introducing an element of uncertainty in the transportation market." 676 F.2d at 1378 (citations omitted).

In construing provisions of the Federal Aviation Act which were virtually identical to the provisions involved here, the District of Columbia Circuit held that the CAB could not "reserve" the power to reject a tariff after it had become effective. *Delta Air Lines, Inc.* v. *CAB*, *supra*. In its brief, the Government attempts to distinguish *Delta* on the grounds that "the court's primary concern in *Delta* was that the CAB, in violation of its statutory mandate failed to conduct a required hearing before rejecting an effective tariff" (Br. 30). However, as the Court noted in the *Southern Motor Carriers* case, *supra*, § 10762 "accords the carrier no procedural rights." Neither did § 403a of the Federal Aviation Act, 49 U.S.C. § 1373(a) (1970), the procedural counterpart to § 10762, provide such rights. Accordingly, the Court in *Delta* held that rates set forth in an already effective tariff may be cancelled *only* upon a finding of unlawfulness made after investigation and hearing pursuant to § 1002 — the Federal Aviation Act counterpart to § 10704 of the Interstate Commerce Act. 543 F.2d at 268.

In any event, the ICC's tariff rejection procedures do not "fully satisfy the hearing requirements of 49 U.S.C. 10704(b)(2)" as the Government contends (Br. 30). The ICC's rule proposed to use the Tariff Integrity Board procedures (Pet. App. 68a, 78a, 90a). As the Court noted in the decision below a "complaint, answer and response are allowed, but there is no discovery, compulsory process, or administration of oaths" (Pet. App. 26a).

Clearly, therefore, the *Delta* case is on all fours with this case. Contrary to the Government's assertion, the "primary concern" of the Court there was simply that the CAB was exceeding its statutory authority in attempting to defer the question of rejection as to tariffs that had become effective. As the Court put it: "Thus, from the plain words of the statute and from the logic of *CAB* v.

Delta and *Municipal Light Boards*, it is clear that once the Board has permitted a tariff to become effective, it may not reject or suspend that tariff; it may only investigate and take appropriate action after notice and hearing." 543 F.2d at 268. (Footnotes omitted).[12]

Hence, of the four decisions by the courts of appeals which have squarely considered the question, only *Aberdeen & Rockfish R. Co.* v. *United States*, *supra* holds that the rejection power may be used to retroactively invalidate effective tariffs. We submit that the *Aberdeen* decision is plainly wrong.

In *Aberdeen*, the Court ignored the context in which 49 U.S.C. § 10762(e) is found and read it as broad authority to reject effective tariffs. It reasoned that "Congress surely would have limited the reach of section 10762(e) to 'ineffective' tariffs had it intended such a result." 682 F.2d at 1099. The Court held that since the statute does not "place any time constraints on the power to reject," it may be exercised at any time. 682 F.2d at 1098. But this ignores the fact that Congress did limit the reach of the section by its choice of words. As the court stated in the decision below, "the plain meaning of rejection is to refuse

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[12] The other *Delta* case cited by the Court is *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). There the Board purported to "reserve" the power to act on a petition for reconsideration and thereby amend a certificate of public convenience and necessity that had become effective. This Court held that after a certificate vests, the Board may alter it only by following the formal notice and hearing procedures required by the Federal Aviation Act.

In the *Municipal Light Boards* case, *supra*, rejection was held appropriate only as a " 'peremptory form of response to filed tariffs' which classically is used not to dispose of a matter on the merits but rather as a technique for calling on the filing party to put its papers in proper form and order." 450 F.2d at 1346.

to receive" (Pet. App. 28a). Had Congress intended the rejection power to be exercised at any time, it would have the word "strike" rather than "reject." The meaning of strike is "to delete, efface, or cancel something." Webster's Third New International Dictionary. It more appropriately describes the action the ICC is attempting to take here. Had Congress intended such a result, however, it would have also provided procedural rights, and it would not have found it necessary to empower the ICC to suspend proposed tariffs or investigate and cancel effective tariffs.

The other cases upon which the Government relies do not support its position. It relies principally on *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957). In that case, the ICC gave the railroads special permission to make effective on five days' notice specific increased rates. The railroads published, filed, and made effective on five days' notice increased rates in excess of those authorized. In a proceeding brought by shippers to recover overcharges, the ICC found that the increased rates were not published on 30 days' notice as required by the Interstate Commerce Act, and that no permission for less than statutory publication had been given for the increases taken. The ICC found, nevertheless, that the "assailed rates were applicable and are not shown to have been unjust, unreasonable, or otherwise unlawful." 253 F.2d at 454. The Court held that since the statute provided that "no change" could be made in rates "except after thirty days' notice" and "this mandatory provision of the statute concerning publication was not complied with," the involved increases had not been "legally established" and the "only existing legally established" rates were the prior rates. 253 F.2d at 456. The railroads were required "to refund to the shippers the difference between the charges paid under

the unlawful rates and those which would have been charged under the last lawfully established rates." 253 F.2d at 451.

Alouette does not support the Government's position here because *Alouette* involved a violation of the 30-day statutory notice requirement and the rates were, therefore, not made in accordance with the Act's provisions for establishing rates. In its holding that the ICC does not have "authority to repeal that section of the Act of Congress requiring publication in order to establish rate changes," *Alouette* is consistent with the decision of the Eighth Circuit in *Chicago, I. & L. Ry. Co.* v. *International Milling Co.*, 43 F.2d 93 (8th Cir. 1930), *cert. denied*, 282 U.S. 885. There the Court held that a tariff which was filed in accordance with the statutory requirements, but which violated the ICC's tariff publication rules had been "legally established." The Court stated that the authority granted the ICC in 49 U.S.C. § 10762(b) "is not to destroy but to simplify rate schedules by prescribing forms therefor." 43 F.2d at 96. However, in its holding that an illegality in filing renders a rate nonexistent and subjects the carriers to liability for overcharges based on the prior rate, the *Alouette* decision conflicts with decisions of this Court and other courts of appeals.

In *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905, the facts were essentially the same as in *Alouette*.[13] The ICC gave the railroads special permission to increase their rates by not more than 12% on 15 days' notice. The railroads published, filed, and made effective on 15 days' notice rate increases of 14%, or 2% more than the ICC authorized. A

[13] As the Court below noted, "*Alouette Peat Products* was a case on all fours with *Genstar*" (Pet. App. 30a).

shipper brought a proceeding to recover overcharges and, relying on the *Alouette* precedent, sought recovery of the entire 14% increase. The ICC held that the shipper was only entitled to recover the 2% difference between the rates authorized and those charged. The shipper brought suit in the district court, relying on 28 U.S.C. § 1336(a), which gives the district court jurisdiction to review ICC orders "for the payment of money," and moved for summary judgment. The district court granted the shipper's motion, awarding it a full 14% recovery on the theory that the entire increase was unlawful because not lawfully established. *Genstar Chemical Ltd.* v. *ICC*, 491 F. Supp. 391 (D.D.C. 1980). The Court of Appeals reversed the judgment of the district court. In rejecting the shipper's argument that it was entitled to a refund of the entire increase, the Court stated:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate, *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 44 S. Ct. 380, 68 L.Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind-White Coal Mining Co.* v. *Chicago & E. R.*, 235 U.S. 371, 35 S. Ct. 131, 59 L.Ed. 275 (1914). The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity. 665 F.2d at 1308.

The Court further stated:

> To the extent *Alouette Peat* can be read to support the result sought by Genstar, we are persuaded that we should not follow it in the face of contrary Su-

preme Court decisions, Commission precedent, and common sense. 665 F.2d at 1309.

For similar reasons, the Court below held "on the basis of persuasive and controlling authority . . . that *Alouette Peat* was wrongly decided" (Pet. App. 29a). The Court stated:

> This decision seems to us internally inconsistent, contrary to the statute and consistent Commission decisions, and in conflict with Supreme Court precedent. It has caused confusion even within the agency for a quarter century. We therefore decline to follow *Alouette Peat*, as the D.C. Circuit declined to follow it in *Genstar*, *supra* (Pet. App. 30a-31a) (footnotes omitted).

Moreover, the ICC itself has recently refused to follow *Alouette* in a case involving violations of rate bureau agreements. In *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890 (1982), on remand from the decision in *Board of Trade of the City of Chicago* v. *ICC*, 646 F.2d 1187 (7th Cir. 1981), the ICC held that certain tariff changes were established contrary to the notice and hearing procedures set forth in an approved railroad ratemaking agreement. In response to protests, the ICC had ordered an investigation into the lawfulness of the rates and had ordered the carriers to keep account of all amounts received as the result of the application of the tariffs ordered investigated.[14] The protestants sought refunds based on the "keep account" order.

The protestants claimed that the ICC "must order the tariffs stricken" and "treat the unlawfully published tariff . . . as void *ab initio*." The ICC held that "[a]bsent a

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[14] The ICC has authority to enter such "keep account" orders with respect to railroad rates but not with respect to motor carrier rates. 49 U.S.C. §§ 10707 and 10708.

showing of actual harm or other equitable considerations that would demonstrate the reasonableness of such a remedy, we do not believe it is appropriate here." 365 I.C.C. at 898-899. In so holding, the ICC relied on the *Genstar* case, *supra*, and quoted from it the same passage we quote above containing the reference to this Court's decisions in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924) and *Berwind-White Coal Mining Co.* v. *Chicago & E. R.*, 235 U.S. 371 (1914). The ICC concluded:

> This is not to say that the carriers' failure to follow rate bureau procedures is comparable, in terms of the gravity of the offense, to a mere technical tariff publication violation. Nevertheless, the principle of measuring the remedy by the actual harm, rather than treating the offending tariff provision as non-existent, is equally sound here. 365 I.C.C. at 900.

The ICC denied any refunds to the shippers but ordered the tariff provisions cancelled prospectively.

The *Transit* case was decided after the ICC had issued its final decision in the case at bar. Hence, the ICC is proposing to treat violations of motor carrier rate agreements differently from violations of railroad rate agreements. In *Transit*, the ICC followed the statutory procedures and cancelled rates prospectively.[15] It also required a showing of "actual harm." Here, it would ignore those procedures and cancel rates retroactively, without any

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[15] The ICC acted pursuant to its "investigation and suspension" authority in the *Transit* case. Since it also has authority to award overcharges to shippers in railroad cases, it separately considered that issue. The ICC has no authority to award overcharges to shippers in motor carrier cases. See 49 U.S.C. §§ 11705(c)(1) and 10706(b).

showing of harm. As the Government states in its brief, under the procedures involved here:

> A tariff rejected after its effective date is considered void ab initio. Accordingly, because the carrier has collected charges that exceed the applicable rate contained in a properly filed tariff, the carrier is liable to refund, as overcharges, all amounts collected in excess of the rates named in the last lawfully filed tariff . . . . Overcharge liability attaches without regard to whether the rates named in the rejected tariff are otherwise reasonable and nondiscriminatory, and without regard to whether shippers were actually damaged by paying the higher rates (Brief, pp. 7-8) (Footnotes omitted).

The Government does not attempt to justify the ICC's double standard. Rather, it blithely states that here it was the ICC's "considered judgment" that the tariffs "should be voided ab initio and overcharges refunded to shippers" (Brief, 20). What the Government is really saying is that the ICC should be permitted to follow *Alouette* when it suits it and ignore it when it does not.

The other cases upon which the Government relies are inapposite. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), this Court held that since the National Gas Act does not empower a natural gas company to change its contracts unilaterally, a rate schedule filing was a "nullity" insofar as it purported to change the contract rate. The Court held that the failure of the agency to reject the "unauthorized filing" (prior to its effective date), and "its order 'permitting' the new rates to become effective were in error." 350 U.S. at 347. The Court emphasized that "[i]f the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found

unlawful by the Commission." 350 U.S. at 342. Here there is no suggestion that the carriers lack the power to change their rates. The suggestion is that the ICC can nullify that power at will.

In *Axinn & Sons Lumber Co., Inc.* v. *Long Island Ry. Co.*, 466 F. Supp. 993 (E.D.N.Y. 1978), the Court held that a tariff filing was "unauthorized" and therefore was not "lawfully on file" with the ICC since it had been made without the consent of the carrier on whose behalf it was purported to be filed. As the Court below stated with respect to the similar situation in *Acme Fast Freight, Inc., supra:* "This is an unexceptional result that allows the Commission to toss out irrelevant and unnecessary material because the filing party is not within its jurisdiction" (Pet. App. 29a).

In *H.J. Baker & Bros.*, 357 I.C.C. 640 (1978), the ICC determined that the claims described in *Genstar Chemical Ltd.* v. *ICC, supra*, were in the nature of "overcharges" and thus subject to the three year period of limitations in the Act and not the two year period applicable to damages not based on overcharges. As noted, however, both the ICC and the D.C. Circuit subsequently refused to treat the claims as "overcharges" within the meaning of the statute.

Finally, *Bell Potato Chip Co.* v. *Aberdeen*, 43 M.C.C. 337 (1944) is of little precedential value. This Court refused to follow it in *T.I.M.E. Incorporated* v. *United States, supra*, 359 U.S. at 476-477. While we dispute the Government's claim that "the Commission has long assumed the authority to reject effective tariffs . . ." (Br. 17), this Court answered a similar contention in *T.I.M.E.* as follows:

> Had Congress been asked legislatively to overrule the doctrines enunciated in Bell Potato Chip, supra,

> and declined to do so, that fact would no doubt have been entitled to some weight in our interpretation of the Act. But we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

The cases cited above clearly establish that the ICC lacks the authority to prescribe the rule in issue here. They hold that where Congress has provided the way in which changes in rates are to be made, the ICC cannot say that changes so made are invalid. As the Eighth Circuit put it in the *International Milling* case, *supra:* "Certainly authority does not rest with the [C]ommission to override acts of Congress." 43 F.2d at 96. The Eleventh Circuit stated it only slightly differently in the *Southern Motor Carriers* case, *supra:* "The Commission refers to its dilemma created by a shrinking budget and a growing number of tariff submissions, but the Commission is 'no more authorized than are the courts to rewrite acts of Congress.' " 676 F.2d at 1380. And, the Ninth Circuit said essentially the same thing in the *Alouette* case, *supra:* "No case has been cited by appellants, nor has the Court found one, holding that the Commission has authority to repeal that section of the act of Congress requiring publication [on 30-days' notice] in order to establish rate changes." 253 F.2d at 454.

II. The Retroactive Invalidation of Effective Tariffs Would Have A Devastating Impact On Carriers.

If the ICC's interpretation of its tariff rejection authority is sustained, effective tariffs may be disregarded or treated as nonexistent simply because of some irregularity in the rate bureau or tariff filing process, thereby rendering the carriers strictly liable for refunds measured by the preexisting rates without regard to whether

the shippers suffered any actual harm. The basic unfairness of this result can best be demonstrated by reference to the ICC's new tariff missymbolization rule that is the subject of the pending petitions for certiorari. Unlike the rule involved in the *Southern Motor Carriers* case, *supra*, or the rule involved here, the missymbolization rule has no time limit for bringing claims other than the applicable three year statute of limitations, and it does not apply to rate reductions—only tariffs containing missymbolized increases will be invalidated; those containing missymbolized reductions will remain valid and effective. As the carriers showed in their petitions, the missymbolization rule would impose extraordinary liability on them for what amount to nothing more than clerical or typographical errors. It is partly for this reason that we take with a grain of salt the statement of Counsel for the Government that only the most "serious" violations of rate bureau agreements will result in retroactive rejection. See Brief for the Petitioners, pp. 12, 24-25.[18] In addition, in the light of the ICC's past and current attempts to drastically curtail or abolish collective ratemak-

[18] Moreover, in a decision served September 30, 1983, in No. 39509, *Reclassification Procedures—National Classification Committee*, the ICC has ordered the National Classification Committee (NCC) to show cause why some 144 changes in the National Motor Freight Classification (NMFC) which were "docketed in its name since May 26, 1981 . . . should not be cancelled or rejected." The NCC is composed of 100 elected motor carrier representatives, and is an autonomous standing committee of National Motor Freight Traffic Association, Inc., the agent for publication of the NMFC. It is the ICC's theory that only "specific identifiable carriers" can originate classification proposals. See *Reclassification of Pork Skins & Bacon Rinds, NMFC* (ICC I & S Docket No. M-30360) (August 4, 1982), pending review *sub nom. National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.). Hence, it would require all changes that were not initiated by individual carriers over the past two and one-half years cancelled or rejected, presumably

ing, we are skeptical, to say the least, that the rule will be administered in the manner that Counsel suggests.[17]

The petitioner in No. 82-804, National Motor Freight Traffic Association (NMFTA), is an organization of approximately 3,000 motor common carriers of property. It is the publishing agent of the National Motor Freight Classification, which is the tariff filed with the ICC which contains the classification of property for ratemaking purposes governing transportation by NMFTA's member carriers.

NMFTA publishes hundreds of tariff changes for its members each year. In many instances, it has no way of knowing whether a change published by it will result in increases in the charges of its members. As NMFTA explained in its comments submitted to the ICC, numerous tariffs make reference to the National Motor Freight Classification, and it is impossible to know what effect a change in the Classification will have on charges set forth in the other tariffs. Detailed examples were supplied which showed that technical violations of the new rule will

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retroactively, since the order also provides that "voluntary cancellation will not necessarily absolve carriers of liability for overcharges collected during the time the rates were in effect."

[17] See the ICC's Notice of Proposed Rulemaking, served October 6, 1983, in Ex Parte No. MC-172, *Withdrawal of Antitrust Immunity For Collective Ratemaking On Small Shipments*. There the ICC is proposing "to withdraw antitrust immunity for collective ratemaking activities by motor carriers of property with respect to shipments under 1,000 pounds." The Notice also asks for "[c]omments on the question of whether antitrust immunity should be withdrawn altogether for motor carrier rate bureau activity." The ICC is proposing to take this action notwithstanding the fact that no new legislation has been enacted on this subject since the Motor Carrier Act of 1980 reaffirmed Congress' intention to continue antitrust immunity for such activity.

be unavoidable because NMFTA has no way of insuring that the symbols it chooses are correct with respect to every charge that will be affected by a classification amendment.

Previously there was no penalty for failure to comply with the tariff symbolization rules other than rejection of the tariff prior to its effective date. Under the new rule, however, failure to comply with the tariff symbolization rules may result in astronomical claims against the carriers. A single change in the Classification may apply to shipments handled by more than 3,000 carriers.[18] Rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day.[19]

Under the rule challenged in *Aberdeen*, shippers harboring some knowledge as to a possible cause of action would be encouraged to wait until the applicable three year statute of limitations had all but lapsed before in-

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[18] The participants in the National Motor Freight Classification include freight forwarders, railroads, water carriers, and intrastate motor common carriers, as well as some 3,000 interstate motor common carriers who are members of NMFTA.

[19] As an example, the increases involved in *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (1970), were relatively modest. As shown in the ICC's report, the increases were 5 percent in the less-than-truckload and any-quantity rates and 50 cents in minimum charge per shipment. The increases applied between, to or from points in 18 states, *L.T.L. Class Rates & Minimum Charges — Midwest & Central*, 325 I.C.C. 106 (1965). As the Court pointed out in *Middlewest*, however, those rate increases were estimated to amount to a minimum of $70,000 per day, making the cost for the 16-day period involved in that case at least $1,190,000. 433 F.2d at 216. NMFTA's tariffs apply nationwide to a much larger group of carriers, and a comparable increase would have a far greater impact.

stituting suits. By waiting until the last minute, the shippers, if successful, would recoup the increases charged over the three year period since they would be entitled to a refund of all charges in excess of those provided in the original tariff. And, of course, the rates may have been changed many times since the offending publication was first published—thus compounding the liability.

Because technical violations of the new rule will be unavoidable, and there is a substantial risk that the carriers will be subjected to catastrophic claims for overcharges, NMFTA asked the ICC to limit the application of the rule so that a classification amendment could not be said to be "improperly symbolized" because it ultimately affected carrier charges in a manner which could not be known at the time of the amendment. The ICC acknowledged that in certain instances tariff publishers "may not be able to gauge the exact effect of all tariff changes" (Appendix 15c).[20] Nevertheless, it denied the relief sought on the ground that tariff publishers can file applications seeking "Special Permission" authority to waive the symbolization requirements when they cannot be certain of a change's ultimate effect.

In its petition to reopen, NMFTA showed that the ICC's "solution" to the problem was wholly impracticable. NMFTA explained that since it could not know in advance the effect of the changes, it could not protect itself by applying for "special permission" unless it did so in every instance. Of course, such a requirement would create intolerable burdens on the carriers, the shippers, and the ICC. NMFTA's petition was denied without any discussion of these objections.

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[20] "Appendix" refers to the appendix filed with the petition in No. 82-707.

In its opinion affirming the ICC's decision, the Fifth Circuit offered another "solution" to NMFTA's dilemma. The Court stated that the ICC "retains sufficient discretion under the new regulation to take account of special cases in determining liability" (Appendix 22b). It further stated that "[t]he ordering of a refund for overcharges remains discretionary, . . . and the Commission retains the right to fashion relief appropriate to individual circumstances" (Appendix 23b).

Of course, the problem with the Court's "solution" is that the ICC will have no say in these matters. As NMFTA pointed out, the Interstate Commerce Act specifies the procedures that shippers must follow to recover overcharges from carriers. With respect to rail carriers, the Act provides that a shipper may bring a "civil action" or file a formal complaint with the ICC. 49 U.S.C. § 11705(c)(1). With respect to motor carriers, a shipper's *only* remedy under the Act is to institute a "civil action." 49 U.S.C. § 11706(b). The shipper may bring its action in either a federal or a state court, but in any such case there is no requirement that it be referred to the ICC, as is the case where there is a question of "reasonableness" of rates. See 49 U.S.C. § 11705(b)(3). Hence, the ICC will not be called upon to decide the motor carrier overcharge claims that arise from its rule.

Moreover, by declaring tariff increases void *ab initio*, and ordering them cancelled and the prior rates reinstated, the ICC is leaving nothing for the courts to decide. A shipper will only need to bring its case to court armed with the ICC's determination that a violation occurred to recover the full amount of any increases. Hence, a rule of absolute liability will be established in these cases, and the ICC will have reduced the requirement that a shipper

bring "a civil action" to recover overcharges to a mere formality.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

BRYCE REA, JR.
PATRICK MCELIGOT*
918 - 16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

NELSON J. COONEY
ROBERT G. GAWLEY
WILLIAM KENWORTHY
F. H. LYNCH, JR.
JOHN W. MCFADDEN, JR.
RONALD C. NESMITH
WILLIAM W. PUGH
J. ALAN ROYAL
SHERMAN D. SCHWARTZBERG
J. ANTHONY TERILLA
ROBERT A. WILSON
CURTIS WOOD

Attorneys for Respondents
**Counsel of Record*

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006

RICE, CARPENTER & CARRAWAY
1600 Wilson Boulevard, #1301
Arlington, VA 22209